Visage Continental Sdn Bhd v Smooth Track Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-03–54 OF 2001
MOKHTAR SIDIN, RICHARD MALANJUM AND MOHD GHAZALI JJCA
13 SEPTEMBER 2007

Administrative Law — Exercise of judicial powers — Domestic tribunal — Fair play, fundamentals of — Whether ought to apply in judicial hearings such as winding up proceedings

Companies and Corporations — Winding up — Appeal against winding up — Disputed debts — Petitioner and debtor agreeing to short adjournment pending negotiations for settlement — Affidavit in opposition not filed — Petitioner resiling from agreement to adjourn pending settlement at the last minute — Petitioner insisting that hearing of petition proceed — High Court judge of the view that debtor had only come to court to seek an adjournment without making any other preparations — High Court judge refusing to accept debtor's explanations — Whether winding up order issued by High Court ought to be set aside — Whether High Court judge ought to have considered debtor's explanations — Whether High Court judge ought to have given debtor time to file affidavit in opposition — Whether petitioner's conduct unconscionable and unfair

Companies and Corporations — Winding up — Disputed debt — Whether dispute as to precise amount owed a sufficient answer to petition if established that the petitioner a creditor for a sum which would otherwise entitle it to a winding up order

Companies and Corporations — Winding up — Disputed debt — Debt disputed on substantial grounds — Circumstances amounting to an abuse of process — Whether court should restrain petitioner from proceeding or dismiss petition

Companies and Corporations — Winding up — Inability to pay debts — Debts due and owing disputed — Petition not based on final court judgment — Whether competent for petition to proceed — Companies Act 1965 s 218

Companies and Corporations — Winding up — Inability to pay debts — Disputed debts — Whether court to consider if dispute is bona fide before deeming

company unable to pay debts and issuing winding up order — Whether court to act judiciously and only consider allegations contained in petition — Whether court ought not go beyond the petition

Companies and Corporations — Winding up — Procedure — Fair play, fundamentals of — Whether ought to apply in judicial hearings such as winding up proceedings

The appellant and respondent had a falling-out over an agency agreement. Each party then alleged the other owed it monies. The respondent filed and served a winding up petition against the appellant. The petition was fixed for hearing on 14 September 2001. The parties attempted to negotiate settlement and the appellant subsequently deposited a cheque for RM194,969 with its solicitors. The cheque was to be released only when the respondent had advertised that it had withdrawn the winding up petition against the appellant. The parties thereafter agreed to sort out and verify their conflicting claims. The parties agreed to seek for a short adjournment of the hearing of the winding up petition on 14 September 2001 pending the verification and possible settlement. The appellant thus did not file an affidavit in opposition. The respondent, after having accepted an offer for settlement, later denied any agreement for settlement and on the hearing date, insisted that the hearing proceed. The High Court judge thus proceeded with the hearing and wound up the appellant. The judge was of the view that the appellant had only come to court to seek an adjournment without making any other preparation in relation to the winding up petition. The appellant thus appealed to the Court of Appeal. On appeal, counsel for the appellant submitted that: (i) the judge should have adjourned the hearing since the parties were negotiating for settlement; (ii) the ongoing negotiations explained the non-filing of the affidavit in opposition; (iii) there were no other creditors; (iv) the winding up under s 218 of the Companies Act 1965 was premature since the debt was disputed, there was no court judgment and the appellant had a cross-claim in the sum of RM400,000 against the respondent.

Held, allowing the appeal with costs:

(1) Section 218(2)(a) of the Companies Act 1965 provides for a creditor to present a petition for winding up of a company which is unable to pay its debt. Prima facie proof of such inability is by way of service of the statutory notice or by some other proof of insolvency. A creditor who has not been paid has the right to file a petition for winding up notwithstanding his motives for doing so. Failure of a company to pay

as demanded would trigger the presumption that it is unable to pay its debt though it is a rebuttal presumption. The onus is upon the company to show that it is able to pay its debt (see para 30); *Morgan Guaranty Trust Co of New York v Lian Seng Properties Sdn Bhd* [1991] 1 MLJ 96; *PT Anekapangan Dwitama v Far East Food Industries Sdn Bhd* [1995] 1 MLJ 21; and *Re Lympne Investments Ltd* [1972] 1 WLR 523 referred.

(2) If after being served with the statutory notice the company disputes the debt stated therein, it is then for the court to consider on the evidence whether the dispute is bona fide before the company is deemed unable to pay its debts and wound up. A dispute as to the precise amount owed is not a sufficient answer to a petition if it is established that the petitioner is a creditor for a sum which would otherwise entitle it to a winding up order. However, if the debt is disputed on substantial grounds and the circumstances are sufficient for the court to hold that the presentation of the petition is an abuse of process, the court must either restrain the petitioner from proceeding with the winding up or dismiss the petition (see paras 31–33); *Re Tweeds Garages Ltd* [1962] 1 All ER 121 referred.

(3) In considering the petition for winding up of a company on the ground that it is unable to pay its debts the court must act judiciously and only consider the allegations contained in the petition. The court should not go beyond the petition (*Datuk Mohd Sari bin Datuk Hj Nuar v Idris Hydraulic (M) Bhd* [1997] 5 MLJ 377 and *Re Lundie Bros Ltd* [1965] 2 All ER 692 referred). Vague allegations in a petition or allegations which are so unsatisfactory as to amount to an abuse of the court entitles the court to strike out the petition in limine (see paras 34–35); *Re WR Willcocks & Co Ltd* [1974] Ch 163; [1973] 2 All ER 93 and *Re A Company* (1985) BCLC 37; [1974] 1 All ER 256; [1973] 1 WLR 1566 referred.

(4) In the instant case, the High Court judge should have at least listened to and considered the explanation given by the appellant's counsel and sought verification from the respondent's counsel. In that way, fairness and fair play would have been maintained. In the instant appeal, it was not disputed that the parties were negotiating before the hearing and that there were meetings between the parties to verify the claims, cross-claims and set offs. It was also not disputed that the respondent retracted after initially agreeing to an offer for a settlement. Thus, there had to be truth in what was asserted before the High Court judge (see paras 37–38).

(5) Even if the High Court judge found the petition to be in order, he should have at least given the appellant the opportunity to be heard and time to file an affidavit in opposition. The respondent had also failed to

practice fair play — there being no reason why the fundamentals of fair play recognized in meetings and domestic enquiries ought not to apply in judicial hearings (see para 39); *Chong Kok Lim & Ors v Yong Su Hian* [1979] 2 MLJ 11 referred.

(6) Even assuming the appeal ought not to have been allowed and the matter be sent for a rehearing instead, the petition was incompetent to proceed. The parties had agreed to have the accounts verified first before the ascertaining the final figure. Therefore, the figure and claims were vague and almost constituted an abuse of process by the respondent. It could not be said that there was no bona fide dispute on the claims. The failure by the appellant to file an affidavit in opposition, was reasonably explained by appellant's counsel and not disputed by the respondent's counsel (see paras 40–41).

(7) A party should not be allowed to approbate and reprobate. The respondent's last-minute retraction was unconscionable and plainly unfair. The respondent should be estopped from denying that it had earlier on agreed to a settlement and the sum payable. For it to say that its letter accepting the settlement offer contained a typo error was indeed unfair and unreasonable (see paras 41–42); *Re Lord Chesham Cavendish v Dacre* [1886] 31 Ch D 466; *Development & Commercial Bank Bhd v Aspatra Corp Sdn Bhd & Anor and another appeal* [1995] 3 MLJ 472; *Mascom (M) Sdn Bhd & Ors v Ken Grouting System Specialist Sdn Bhd* [2004] 2 MLJ 163; *PB Securities Sdn Bhd v Autoways Holding Bhd* [2000] 4 MLJ 417; *Sabah Finance Bhd v Addspeed Enterprises Sdn Bhd & Ors* [1995] 4 CLJ 645; *Boustead Trading Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331 and *Leong Huat Sawmill (Pte) Ltd v Lee Man See* [1985] 1 MLJ 47 referred.

[Bahasa Malaysia summary

Perayu dan responden telah mempertikaikan satu perjanjian agensi. Pihak-pihak masing-masingnya kemudian mengatakan yangt satu lagi berhutang wang dengannya. Responden telah memfailkan dan menyampaikan satu petisyen penggulungan terhadap perayu. Petisyen tersebut telah ditetapkan untuk perbicaraan pada 14 September 2001. Pihak-pihak telah cuba merundingkan penyelesaian dan perayu berikutan itu telah mendepositkan satu cek untuk RM194,969 dengan peguamnya. Cek tersebut hanya boleh dilepaskan selepas responden mengiklankan abhawa ia telah menarik balik petisyen penggulungan tersebut terhadap perayu. Pihak-pihak tersebut kemudiannya bersetuju menyelesaikan dan mengesahkan dakwaan mereka yang bercanggah. Pihak-pihak tel;ah bersetuju untuk memohon satu penangguhan pendek perbicaraan petisyen penggulungan pada 14 September 2001 sementara menunggu pengesahan

dan penyelesaian yang mungkin. Perayu oleh itu tidak memfailkan satu afidavit tentangan. Responden, setelah menerima tawaran untuk penyelesaian, kemudiannya menafikan apa-apa perjanjain untuk penyelesaian dan pada tarikh perbicaraan, mendesak perbicaraan diteruskan. Hakim Mahkamah Tinggi oleh itu telah meneruskan perbicaraan dan menggulung perayu. Hakim berpendapat bahawa perayu hanya datang ke mahkamah untuk memohon penangguhan tanpa membuat apa-apa persediaan lain berkaitan petisyen penggulungan tersebut. Perayu oleh itu telah merayu ke Mahkamah Rayuan. Semasa rayuan, peguam bagi pihak perayu berhujah bahawa: (i) hakim sepatutnya telah menagguhkan perbicaraan memandangkan pihak-pihak sedang berbincang untuk satu penyelesaian; (ii) perbincangan yang sedang berlaku menjelaskan afidavit tentangan yang tidak difailkan; (iii) tiada pemiutang lain; (iv) penggulungan di bawah s 218 Akta Syarikat 1965 adalah pra matang memandangkan hutang tersebut dipertikaikan, tiada penghakiman mahkamah dan perayu mempunyai satu tuntutan balas berjumlah RM400,000 terhadap responden.

Diputuskan, membenarkan rayuan tersebut dengan kos:

(1) Seksyen 218(2)(a) Akta Syarikat 1965 memperuntukkan pemiutang mengemukakan petisyen untuk menggulungkan syarikat yang gagal membayar hutangnya. Bukti prima facie ketidakmampuan ini adalah melalui serahan notis statutori atau melalui bukti ketidaksolvenan lain. Pemiutang yang tidak dibayar mempunyai hak untuk memfailkan satu petisyen penggulungan tanpa mengira motif-motif beliau berbuat sedemikian. Kegagalan sebuah syarikat membayar seperti yang dituntut akan menimbulkan andaian bahawa ia tidak mampu membayar hutangnya meskipun ia satu andaian pematahan. Beban terletak ke atas syarikat untuk menunjukkan bahawa ia mampu membayar hutangnya (lihat perenggan 30); *Morgan Guaranty Trust Co of New York v Lian Seng Properties Sdn Bhd* [1991] 1 MLJ 96; *PT Anekapangan Dwitama v Far East Food Industries Sdn Bhd* [1995] 1 MLJ 21; dan *Re Lympne Investments Ltd* [1972] 1 WLR 523 dirujuk.

(2) Sekiranya setelah diserahkan dengan notis statutori syarikat tersebut mempertikaikan hutang yang dinyatakan dalamnya maka ianya untuk mahkamah mempertimbangkan atas keterangan sama ada pertikaian tersebut adalah bona fide sebelum syarikat tersebut dianggap tidak mampu membayar hutangnya dan digulung. Satu pertikaian berhubung jumlah tepat yang terhutang bukan satu jawapan yang memadai untuk satu petisyen jika ia terbukti bahawa pempetisyen adalah pemiutang untuk suatu jumlah yang sebaliknya memberinya hak terhadap satu perintah penggulungan. *Re Tweeds Garages Ltd* [1962] 1 All ER 121 dirujuk. Namun, jika hutang tersebut dipertikaikan atas

alasan-alasan penting dan keadaan adalah memadai untuk mahkamah memutuskan bahawa penyampaian petisyen tersebut merupakan satu penyalahgunaan proses, mahkamah hendaklah sama ada menyekat pempetisyen daripada meneruskan dengan penggulungan atau menolak petisyen tersebut (lihat perenggan 31–33).

(3) Dalam mempertimbangkan petisyen untuk menggulung sebuah syarikat atas alasan bahawa ia tidak mampu membayar hutangnya mahkamah hendaklah bertindak secara bijak dan hanya mengambilkira pengataan-pengataan yang terkandung dalam petisyen tersebut. Mahkamah tidak sepatutnya melebihi apa yang terkandung dalam petisyen tersebut (*Datuk Mohd Sari bin Datuk Hj Nuar v Idris Hydraulic (M) Bhd* [1997] 5 MLJ 377 dan *Re Lundie Bros Ltd* [1965] 2 All ER 692 dirujuk). Pengataan-pengataan yang tidak jelas dalam petisyen atau pengataan-pengataan yang tidak memuaskan untuk membuktikan penyalahgunaan mahkamah membenarkan mahkamah membatalkan petisyen tersebut in limine (lihat perenggan 34–35); *Re WR Willcocks & Co Ltd* [1974] Ch 163; [1973] 2 All ER 93 dan *Re A Company* (1985) BCLC 37; [1974] 1 All ER 256; [1973] 1 WLR 1566 dirujuk.

(4) Dalam kes semasa, hakim Mahkamah Tinggi sepatutnya mendengar dan mempertimbangkan penjelasan yang diberikan oleh peguam perayu dan meminta pengesahan daripada peguam responden. Dengan cara sedemikian, keadilan dan sikap adil pasti dapat dikekalkan. Dalam rayuan semasa, ia tidak dipertikaikan bahawa pihak-pihak sedang berbincang sebelum perbicaraan dan bahawa terdapat beberapa mesyuarat antara pihak-pihak untuk mengesahkan tuntutan-tuntutan, tuntutan-tuntutan balas dan penolakan-penolakan. Ia juga tidak dipertikaikan bahawa responden telah menarik balik selepas pada mulanya bersetuju dengan tawaran untuk satu penyelesaian. Oleh itu, terdapat kebenaran dalam apa yang dihujahkan di hadapan hakim Mahkamah Tinggi (lihat perenggan 37–38).

(5) Jikapun hakim Mahkamah Tinggi mendapati petisyen tersebut adalah teratur, beliau sepatutnya sekurang-kurangnya memberikan perayu peluang untuk didengar dan masa untuk memfailkan satu afidavit tentangan. Responden juga gagal untuk mengamalkan sikap adil — di mana tiada sebab kenapa dasar sikap adil yang dikenali dalam mesyuarat dan siasatan dalaman tidak sepatutnya digunakan dalam perbicaraan kehakiman (lihat perenggan 39); *Chong Kok Lim & Ors v Yong Su Hian* [1979] 2 MLJ 11 dirujuk.

(6) Jikapun dengan menganggap rayuan tersebut tidak patut dibenarkan dan perkara tersebut sebaliknya dihantar untuk perbicaraan semula, petisyen tersebut tidak kompeten untuk diteruskan. Pihak-pihak telah bersetuju agar akaun-akaun tersebut disahkan terlebih dahulu sebelum

menentukan angka muktamad. Oleh itu, angka dan tuntutan-tuntutan tidak jelas dan hampir membentuk satu penyalahgunaan proses oleh responden. Ia tidak boleh dikatakan bahawa tiada pertikaian bona fide ke atas tuntutan-tuntutan tersebut. Kegagalan oleh perayu untuk memfailkan afidavit tentangan telah dijelaskan secara munasabah oleh peguam perayu dan tidak dipertikaikan oleh peguam responden (lihat perenggan 40–41).

(7) Suatu pihak tidak patut dibenarkan aprobat dan reprobat. Penarikan balik saat akhir responden tidak berpatutan dan jelas tidak adil. Responden sepatutnya diestopkan daripada menafikan bahawa ia terlebih dahulu telah dipersetujui terhadap satu penyelesaian dan jumlah yang perlu dibayar. Untuknya menyatakan bahawa suratnya menerima tawaran penyelesaian mengandungi ralat taip sememangnya tidak adil dan tidak munasabah (lihat perenggan 41–42); *Re Lord Chesham Cavendish v Dacre* [1886] 31 Ch D 466; *Development & Commercial Bank Bhd v Aspatra Corp Sdn Bhd & Anor and another appeal* [1995] 3 MLJ 472; *Mascom (M) Sdn Bhd & Ors v Ken Grouting System Specialist Sdn Bhd* [2004] 2 MLJ 163; *PB Securities Sdn Bhd v Autoways Holding Bhd* [2000] 4 MLJ 417; *Sabah Finance Bhd v Addspeed Enterprises Sdn Bhd & Ors* [1995] 4 CLJ 645; *Boustead Trading* (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331 dan *Leong Huat Sawmill (Pte) Ltd v Lee Man See* [1985] 1 MLJ 47 dirujuk.]

Notes

For cases on appeal against winding up, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 992–994.

For cases on disputed debt, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 1048–1056.

For cases on inability to pay debts, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 1081–1142.

Cases referred to

A Company, Re (1985) BCLC 37; [1974] 1 All ER 256; [1973] 1 WLR 1566 (refd)

Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331 (refd)

Chong Kok Lim & Ors v Yong Su Hian [1979] 2 MLJ 11 (refd)

Development & Commercial Bank Bhd v Aspatra Corp Sdn Bhd & Anor and another appeal [1995] 3 MLJ 472 (refd)

Leong Huat Sawmill (Pte) Ltd v Lee Man See [1985] 1 MLJ 47 (refd)

Lord Chesham Cavendish v Dacre, Re [1886] 31 ChD 466 (refd)

Lympne Investments Ltd, Re [1972] 1 WLR 523 (refd)

Mascom (M) Sdn Bhd & Ors v Ken Grouting System Specialist Sdn Bhd [2004] 2 MLJ 163 (refd)
Morgan Guaranty Trust Co of New York v Lian Seng Properties Sdn Bhd [1991] 1 MLJ 96 (refd)
PB Securities Sdn Bhd v Autoways Holding Bhd [2000] 4 MLJ 417 (refd)
PT Anekapangan Dwitama v Far East Food Industries Sdn Bhd [1995] 1 MLJ 21 (refd)
Sabah Finance Bhd v Addspeed Enterprises Sdn Bhd & Ors [1995] 4 CLJ 645 (refd)
WR Willcocks & Co Ltd, Re [1974] Ch 163; [1973] 2 All ER 93 (refd)

Legislation referred to
Companies Act 1965 s 218

Appeal from: Companies Winding Up No MT2–28–79 of 2001 (High Court, Shah Alam)

Tan Chee Keong (Jasmine Teoh with him) (CK Tan & Co) for the appellant.
Sarojit Kaur (Onn & Partners) for the respondent.

Richard Malanjum JCA (now CJ (Sabah and Sarawak) delivering judgment of the court):

INTRODUCTION

[1] The matter before us is an appeal by the appellant (the respondent in the court below) against the decision of the High Court made on 28 September 2001 wherein upon the presentation and hearing of the petition filed by the respondent (the petitioner in the court below) under s 218 of the Companies Act 1965 ('the Act') it was ordered that the appellant be wound up.

FACTS OF THE CASE

[2] The appellant was incorporated in September 1995 with a paid up capital of RM3,000,000. Its principal business activities include shipping agency representing several shipping lines.

[3] On or about 1 October 1996, the appellant was appointed the shipping agent for a South Korean Shipping Line, Hanjin Shipping Co Ltd ('Hanjin') which has a regional office based in Singapore. The appellant succeeded the former agent of Hanjin namely, Marine Meridien Sdn Bhd.

A **[4]** Upon the expiry of the agreement between Hanjin and the appellant, Hanjin appointed the respondent as their agent for Peninsula placecountry-regionMalaysia.

B **[5]** Pursuant to an agency agreement dated 1 April 2000, the respondent with the consent of their principal, Hanjin, duly appointed the appellant as their exclusive sub-agent for East Malaysia, ie Labuan and all of Sabah and Sarawak ports. Added in to the territories however, were Malacca and Kuantan ('the territories').

C **[6]** Not long after the appointment of the appellant by its letter dated 23.8.2000 the respondent unilaterally and without assigning any reason thereto terminated the sub-agency of the appellant by giving it a three months' notice in writing and effective from 24 November 2000.

D **[7]** Subsequently the parties or their representatives had several meetings to sort out, verify and settle all the accounts prior to the handing back of the agency on the territories to the respondent.

E **[8]** During the process of verifying the accounts both parties came out with their own claims or counterclaims against each other.

[9] Whilst the appellant admitted owing the respondent a sum of
F RM33,595.60 without yet taking into account the sum of RM500,000 it had spent on the instruction of Hanjin to upgrade and renovate the offices in the territories, the respondent by its letter dated 4 January 2001 claimed that the appellant owed it the sum of RM540,050.76 after deducting the sum of RM54,003 being commission due to the appellant.

G **[10]** Arising from the claim by the respondent the appellant sought for a proper handing over of the business as per in the agency agreement which would include the verification and settlement of all accounts between the
H parties.

[11] The respondent did not favourably respond to the request. Instead it caused to be issued and served on the appellant a notice under s 218 of the Act.

I **[12]** Subsequently a winding up petition was filed by the respondent seeking to wind up the appellant on the ground of being unable to pay its debt. There was no court judgment against the appellant filed to support the petition.

[13] Upon being served with the petition the new solicitors of the appellant in its letter dated 1 August 2001 offered to settle the outstanding sum of RM194,969 in one payment within seven days from the date of confirmation by the respondent of the said sum. It was also requested that the respondent withhold the advertisement of the petition pending the outcome of the negotiation of the parties.

[14] By a letter dated 6 August 2001 the solicitors for the respondent informed the solicitors of the appellant of their client's agreement to the settlement proposal except that it could not withhold the advertisement of the petition which had been arranged earlier on.

[15] A cheque for the sum of RM194,969 was thus deposited on 15.8.2001 by the appellant to its solicitors with instruction to release the same to the solicitors for the respondent upon fulfilling the request by the appellant that the respondent through its solicitors caused a notice to be advertised that it had withdrawn it Winding up petition against the appellant.

[16] However in a meeting held on 7 September 2001 the Managing Director of the respondent refused to take into account all monies advanced or spent by the appellant on behalf and on instruction of Hanjin prior to 1 April 2000. The respondent also failed to account being the new agent for Hanjin all monies including disbursements and advances made by the appellant while as the agent for Hanjin.

[17] Despite the differences between the parties it was agreed during that meeting for the representatives of each party to go through the invoices and claims submitted by the appellant and to verify them with the view to reconcile them with the figures of the respondent.

[18] In view of the pending verification exercise and probable settlement of the matter it was therefore agreed that the parties should seek for a short adjournment of the hearing of the winding up scheduled on 14 September 2001.

[19] Then on the day of hearing of the winding up petition and despite having agreed to a short adjournment the respondent insisted for the hearing to proceed knowing full well that the appellant was no longer within the seven days requirement to file an affidavit in opposition to the winding up petition.

[20] At the same time in a letter dated 14 September 2001 the solicitors for the respondent admitted a discrepancy of RM69.862.61 in the claim stated in the winding up petition.

A **[21]** Meanwhile, on the materials submitted to the respondent for verification the respondent could not dispute the invoices and the advances made by the appellant.

B **[22]** Incidentally, by its letter dated 6 August 2001 the respondent accepted the offer made by the appellant the sum offered as full and final settlement of all sums due from the appellant to the respondent. However by its solicitors' letter dated 17 August 2001 the respondent rejected the offer and claimed that the initial acceptance was due to typo error.

C **[23]** During the hearing of the winding up petition and in view of the stance subsequently adopted by the respondent the learned judge thus refused to adjourn and proceeded to hear the matter resulting in the order to wind up the appellant.

D **[24]** It was also the view of the learned judge that the appellant only came to court to seek for adjournment without making any other preparation in relation to the Winding up petition.

E **[25]** Before us learned counsel for the appellant submitted that the learned judge should have adjourned the hearing since the parties were still negotiating for settlement. That explained for the non-filing of an affidavit in opposition. There was no other creditor involved or supporting the petition.

F **[26]** Further it was argued that the winding up under s 218 was pre-matured since the debt was disputed, there was no court judgment and the appellant had cross-claim in the sum of RM400,000 against the
G respondent. For these reasons it was submitted that the respondent did not have the locus standi to present the petition.

[27] For the respondent it was submitted that the winding up petition was
H in order and without any affidavit in opposition filed by the appellant the learned Judge had no choice but to hear it in the exercise of his discretion and made the order accordingly.

[28] It was also contended that the learned judge was correct in not
I granting the adjournment since the appellant only came to court to seek for adjournment without making any preparation to answer the winding up petition.

[29] Now, s 218(2)(a) of the Act reads as follows:

A company shall be deemed to be unable to pay its debts if:

(a) a creditor by assignment or otherwise to whom the company is indebted in a sum exceeding five hundred ringgit then due has served on the company by leaving at the registered office a demand under his hand or under the hand of his agent thereunto lawfully authorised requiring the company to pay the sum so due, and the company has for three weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor;.

[30] This provision has been judicially considered by our courts in several reported cases. Basically it is intended to provide for a creditor to present a petition for winding up of a company which is unable to pay its debt. Prima facie proof of such inability is by way of service of the statutory notice or by some other proof of insolvency. Thus a creditor who has not been paid has the right to file a petition for winding up notwithstanding his motives for doing so (see *Morgan Guaranty Trust Co of New York v Lian Seng Properties Sdn Bhd* [1991] 1 MLJ 96). Failure of a company to pay as demanded would trigger the presumption that it is unable to pay its debt. But it is a rebuttal presumption in which the onus to rebut is upon the company to show that it is able to pay its debt (see *PT Anekapangan Dwitama v Far East Food Industries Sdn Bhd* [1995] 1 MLJ 21; *Re Lympne Investments Ltd* [1972] 1 WLR 523).

[31] If after being served with the statutory notice the company disputes the debt stated therein then it is for the court to consider on the evidence whether the dispute is bona fide before it can be said that the company is to be deemed unable to pay its debts and appropriate to be wound up.

[32] It is to be noted that a dispute as to the precise amount owed would not be a sufficient answer to a petition if it can be established that the petitioner is a creditor for a sum which would otherwise entitle it to a winding up order (see *Re Tweeds Garages Ltd* [1962] 1 All ER 121).

[33] But if the debt is disputed on substantial grounds and the circumstances are sufficient for the court to hold that the presentation of the petition is an abuse of process, the petitioner is either restrained from proceeding with the winding up or the petition is dismissed.

[34] In considering the petition for winding up of a company on the ground that it is unable to pay its debt the court must act judiciously and should only consider the allegations contained in the petition and will not go beyond it (see *Datuk Mohd Sari bin Datuk Hj Nuar v Idris Hydraulic (M) Bhd* [1997] 5 MLJ 377; *Re Lundie Bros Ltd* [1965] 2 All ER 692).

A **[35]** Indeed, vague allegations in a petition or allegations which were so unsatisfactory as to amount to an abuse of the court would certainly entitle the court to strike out the petition in limine (see *Re WR Willcocks & Co Ltd* [1974] Ch 163; [1973] 2 All ER 93; *Re A Company* (1985) BCLC 37; [1974] 1 All ER 256; [1973] 1 WLR 1566).

B

[36] Reverting to the present appeal it is obvious that the main reason for the learned judge in not granting an adjournment is that the appellant came to Court without making any preparation for the hearing except to seek for an adjournment. There was no affidavit in opposition filed.

C

[37] But with respect the learned judge should have at least listen and considered the explanation given by the learned counsel for the appellant and sought for verification from the learned counsel for the respondent. In that way fairness and fair play are maintained.

D

[38] Indeed before us learned counsel for the respondent did not dispute the fact that the parties were negotiating before the hearing and that there were meetings between the parties to verify the claims and the cross-claims and set offs. There was also no dispute that the respondent retracted after agreeing at first to a settlement in the sum of RM184,000. Hence, there must be truth in what was asserted before the learned High Court judge.

E

[39] Accordingly, the learned High Court judge should have at least given the appellant the opportunity to be heard and the time perhaps to file an affidavit in opposition even if he viewed that the petition was in order. In our view the respondent failed to practice fair play in this instance. Indeed the importance of the fundamentals of fair play had been recognized in meeting and domestic enquiry. We see no reason why the same principle should not apply in judicial hearing (see *Chong Kok Lim & Ors v Yong Su Hian* [1979] 2 MLJ 11). On this ground alone that we allowed the appeal.

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[40] In the event that we are wrong in just allowing the appeal when we could have sent the matter for rehearing, we are also of the view that premised on what were said before us and not disputed by learned counsel for the respondent we find that the petition is incompetent to proceed.

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[41] It is not disputed that indeed the parties agreed to have the accounts verified first before the final figure could be ascertained. Thus, the figure and claims can be said to be vague bordering to an abuse of process by the respondent. As such it cannot be said that there is no bona fide dispute on the claims. The only shortcoming was the failure by the appellant to file an affidavit in opposition. But given the reason and not disputed by the learned counsel for the respondent we are of the view that the explanation for such

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failure is reasonable in the circumstances. If not for the last minute retraction by the respondent the matter might not have even reached the court. We would say that a party should not be allowed to approbate and reprobate (see *Re Lord Chesham Cavendish v Dacre* [1886] 31 Ch D 466; *Development & Commercial Bank Bhd v Aspatra Corp Sdn Bhd & Anor and another appeal* [1995] 3 MLJ 472; *Mascom (M) Sdn Bhd & Ors v Ken Grouting System Specialist Sdn Bhd* [2004] 2 MLJ 163; *PB Securities Sdn Bhd v Autoways Holding Bhd* [2000] 4 MLJ 417; *Sabah Finance Bhd v Addspeed Enterprises Sdn Bhd & Ors* [1995] 4 CLJ 645). It is unconscionable and plainly unfair.

[42] We also say that the respondent should be estopped from denying that it had earlier on agreed to a settlement and the sum payable. For it then to say that it was a typo error is indeed unfair and unreasonable (see *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331; *Leong Huat Sawmill (Pte) Ltd v Lee Man See* [1985] 1 MLJ 47).

[43] Thus, for the above reasons that we allowed the appeal with costs.

Appeal allowed with costs.

Reported by Andrew Christopher Simon